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## Torts–Liability for Injury to Infant Arising Out of "Attractive Nuisance"

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TORTS — LIABILITY FOR INJURY TO INFANT ARISING OUT OF "ATTRACTIVE NUISANCE." — Petitioner's intestate, a child five years of age, while upon a municipal wharf with other children without permission, supposedly for the purpose of playing upon a sand pile, fell through a hole in the wharf and was drowned. In an action for damages for the alleged negligent injury, the trial court, upon the completion of the opening statement of plaintiff's counsel, directed a verdict for the defendant. *Certiorari* to the U. S. Supreme Court. *Held*: Whether the defendant was negligent in maintaining the wharf in a dangerous condition by reason of the holes therein and the attraction of sand piles thereon to small children, lawfully upon a nearby street, whose presence upon the wharf (lacking fence or barriers) the defendant might, therefore, reasonably anticipate, was for the jury. *Best v. District of Columbia*.<sup>1</sup>

The effect of the doctrine of the principal case apparently extends the preexisting Federal rule of *Sioux City & P. R. R. Co. v. Stout*<sup>2</sup> as modified by *United Zinc & Chemical Co. v. Britt*<sup>3</sup> to permit recovery for injury occasioned by a nonattractive dangerous condition upon premises, where a nondangerous but attractive condition induced the trespass.<sup>4</sup> Undoubtedly this extension will be cautiously applied,<sup>5</sup> presumably to situations where the non-dangerous attraction is the proximate cause of the injury.<sup>6</sup>

The operative facts giving rise to this supposed extension of the "turntable doctrine" were not directly adverted to in the opinion and whether the result may be viewed as indicating a

<sup>1</sup> 54 S. Ct. 487 (1934), per Hughes, C. J.

<sup>2</sup> 17 Wall. (U. S.) 657, 21 L. Ed. 745 (1873).

<sup>3</sup> 258 U. S. 268, 42 S. Ct. 299 (1922). To the effect that the Britt case did not overrule *Sioux City & P. R. Co. v. Stout*, see Hudson, *The Turntable Cases in the Federal Courts* (1923) 36 HARV. L. REV. 826. But see the dissenting opinion of Clarke, J., in the Britt Case.

<sup>4</sup> In the case at hand the holes in the wharf, by means of which the child was injured, were nonattractive but dangerous, while the sand piles which attracted the children were harmless. *Union Pacific Railway Co. v. McDonald*, 152 U. S. 262, 14 S. Ct. 619 (1893) permitted a recovery in a similar factual situation, but strengthened by a violation of a fencing statute and by the fact that the plaintiff was scarcely a trespasser.

<sup>5</sup> Cf. *National Metal Edge Box Co. v. Agostini*, 258 Fed. 109 (C. C. A. 2nd, 1919), where a child was attracted to play upon a private road and drowned in a canal. The court said, "attractiveness of the road or invitation to play thereon cannot be said to include the canal."

<sup>6</sup> *Public Service Ry. Co. v. Wursthorn*, 278 Fed. 408 (C. C. A. 3rd, 1922); *Seymour v. Union Stockyards & Transit Co.*, 224 Ill. 579, 79 N. E. 950 (1906); *McDermott v. Burke*, 256 Ill. 407, 100 N. E. 168 (1912); *Swartwood's Guardian v. Louisville & N. R. Co.*, 129 Ky. 247, 111 S. W. 305 (1908); *Martin v. Northern Pac. Ry. Co.*, 51 Mont. 31, 149 Pac. 89 (1915).

tendency of the Federal courts away from the "hard doctrine" of the *Britt* case is questionable.<sup>1</sup>

—WILLIAM F. WUNSCHEL.

TRIAL — INSTRUCTIONS — UNANIMITY OF THE JURY VERDICT.  
— Action was brought for personal injuries. In reviewing the jury verdict in favor of the plaintiff, the Supreme Court held that the defendant's requested instruction on unanimity of the jury verdict was incomplete, in that too little emphasis was placed on the duty to agree, if possible; that the refusal, therefore, could not be deemed error. *Robertson v. Hobson*.<sup>1</sup>

Prior to 1367, the jury verdict was controlled by the majority.<sup>2</sup> After this date, the rule became that the litigants, in cases either civil or criminal, were entitled to an instruction that the verdict must be unanimous, if the instructions be not couched in terms inviting obduracy or disagreement.<sup>3</sup> The courts are apparently more exacting in criminal<sup>4</sup> than in civil<sup>5</sup> trials. The tendency to depart from the strict rule in civil actions seems not to extend to criminal cases, where the social interest in expediting trials is

<sup>1</sup> It is submitted that the principal decision neither expressly nor by implication overrules *United Zinc Co. v. Britt*, but if an extension, is applicable only to the doctrine of the *Stout* case, being itself likewise amenable to the modifying influence of the *Britt* case.

<sup>1</sup> 171 S. E. 745 (1933).

<sup>2</sup> Y. B. 41 EDW. III, Mich. pl. 36 (1367); HOLDSWORTH, HISTORY OF ENG. LAW (3rd ed. 1922) vol. 1, 318.

<sup>3</sup> BLACKSTONE'S COMMENTARIES, Book 4 (1769), Ch. 27, 343; C. and N. W. Ry. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15 (1889); *Emory v. Monongahela West Penn Pub. Service Co.*, 111 W. Va. 699, 163 S. E. 620 (1932); *Birmingham Ry. Light and Power Co. v. Goldstine*, 181 Ala. 517, 61 So. 218 (1913). Unanimity of the jury is essential; but while the charge may be said to assert this proposition, yet if in the particular case it possesses misleading tendencies, it is properly refused.

<sup>4</sup> *Supra* n. 2, at 319; *Clem v. State*, 42 Ind. 420 (1873) (an instruction that stated that no number of minds could agree upon a multitude of facts, and there must be some yielding, within limits and without sacrifice of conscience, was not sanctioned). *State v. Edgell*, 94 W. Va. 198, 118 S. E. 144 (1923). (Instruction on unanimity should have been given. It was not covered by any other instruction.) *State v. Wiseman*, 94 W. Va. 224, 118 S. E. 139 (1923). (The presumption that defendant was prejudiced was applied where lower court refused an instruction on unanimity). See, also, *State v. Noble*, 96 W. Va. 432, 123 S. E. 237 (1924). (Here, instruction said nothing about consulting fellow jurors; but the court held that defendant was entitled to an instruction on the unanimity of the jury verdict.)

<sup>5</sup> *Chicago and Alton Ry. Co. v. Kirkland*, 120 Ill. App. 272 (1905). (Much discretion is allowed the trial court and not error to refuse an instruction on the unanimity of the verdict.) *Shaller v. Detroit United Ry.*, 139 Mich. 171, 102 N. W. 632 (1905). (It is presumed that a juror knows